

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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MAR 7 1995

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re)

Review of the Prime Time)
Access Rule,)
Section 73.658(k) of the)
Commission's Rules)

MM Docket No. 94-123

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To: The Commission

COMMENTS OF GROUP W

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SUMMARY OF COMMENTS

This proceeding presents two very different issues for Group W. In its view, the basic Prime Time Access Rule (PTAR) principle is as necessary now as it was when originally proposed by Group W and adopted by the Commission in 1970. While the television industry has grown substantially since then, the fundamental public interest basis for this modest measure has not abated. In providing for a meaningful degree of licensee program responsibility, PTAR is essential to a balanced network-affiliate relationship.

The off-network restriction, however, is a horse of a different color. This restriction on licensee program discretion, never an essential component of PTAR, has become a highly unfair and discriminatory anachronism, treating similarly situated network affiliates in a very disparate manner. It should be promptly repealed.

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Westinghouse Broadcasting Company, a division of Westinghouse Electric Corporation ("Group W"), submits the following comments in response to the Commission's Notice of Proposed Rulemaking, FCC 94-266, released October 25, 1994, in the above-referenced matter.

This proceeding has been instituted to review the necessity of the Prime Time Access Rule ("PTAR"), Section 73.658(k) of the Commission's rules, in light of present industry economic and technological conditions. Group W was the original proponent of PTAR and has been a strong PTAR advocate in various Commission proceedings addressing the rule since its adoption in 1970.

In the over two decades since PTAR was adopted, the television industry and video marketplace has grown substantially. Compared to 1970, the television industry is

now more diverse, with more stations and a more diverse supply of programming for stations. NATPE, the National Association of Television Program Executives, did not exist in 1970. Now, it is one of the industry's main trade associations and annual conventions. These developments are attributable in no small part to the changed industry conditions brought about by PTAR. The basic PTAR principle and resulting high audience time made available for local station use has become a widely accepted structural component of the television industry.

Group W is proud to have been a participant in this success and remains convinced that the basic PTAR principle is as necessary as ever in the evolving television marketplace. By the same token, Group W urges the Commission to act promptly to repeal the outmoded off-network restriction. In today's competitive marketplace, PTAR can work fairly only if the baggage of the off-network restriction is eliminated.

I. WHAT PTAR WAS INTENDED TO ACCOMPLISH

Any evaluation of PTAR obviously must be undertaken in context of its intended objectives. While this is recognized in the Notice, the precise objectives which prompted the Commission to act need to be clarified, or at

least placed in their proper order of priority. To say, for example, that "PTAR was promulgated in 1970 in response to the concern that the three major television networks -- ABC, CBS and NBC -- dominated the program production market . . ."^{1/} does not accurately reflect the central focus of PTAR.

In adopting PTAR, the Commission was primarily concerned -- not with the three networks' power over their program suppliers per se -- but with excessive control over affiliated stations' prime time viewing hours and resulting ability to determine what programming could be seen by the American public. Viewed in light of this objective, the rule has been an unqualified success.

The Commission had good reason to be concerned. For it is the local licensee and not the network who is charged with serving the needs and interests of its audience under the "public interest" standard of the Communications Act. Under our locally oriented television broadcasting system established by the Commission in the landmark Sixth Report and Order, 41 FCC 148 (1952), the local station licensee has the ultimate program responsibility. It must have the means to carry out this responsibility in an effective manner through the ability to select an appropriate mix of high-

^{1/} Notice, ¶1. See also ¶54 ("For example, the rule is intended to promote independent program production").

quality network programming, its own locally produced programming and other nationally produced programming.

Initially, the Commission had proposed to adopt the so-called "50/50 Rule" which would have restricted network ownership of, or other interests in, programs exhibited by the network.^{2/} Had this original proposal been adopted, it might have been proper to focus primarily on the network-program supplier relationship, as the 50/50 proposal was designed to lessen network influence over programs exhibited on the network. But this approach was not adopted and instead the Commission opted for the more direct approach of "opening up time . . . outside the network funnel."^{3/}

The PTAR concept was first advanced by Group W out of a concern for the continued vitality of the local broadcasting and television station industry and to bring more meaning to the program selection responsibilities of individual television licensees. Essentially, it was for this same reason that PTAR was adopted by the Commission:

Our objective is to provide opportunity-now lacking in television-for the competitive development of alternative sources of television programs so that television licensees can exercise something more than a

^{2/} This rule would have restricted the offering of a network schedule, more than 50% of which in a calendar week (with certain exceptions), was comprised of programs ". . . of which the network television licensee was the producer or co-producer" or in which it has acquired any right beyond certain limited network carriage rights. 4 RR 2d at 1615-16. To the extent the Notice (§54) suggests that this concept could now replace PTAR, it is as unwise an idea now as it was in 1970.

^{3/} Network Television Broadcasting, 23 FCC 2d 382, 384 (1970).

nominal choice in selecting programs which they present to the television audience in their communities.

Network Television Broadcasting, supra, 23 FCC 2d at 397.

This expression of basic intent was reenforced by the Commission on reconsideration:

. . . our television broadcast structure is over-centralized and poses a serious question as to whether the basic concept of a competitive, locally responsive television structure as envisioned by Congress in this Commission is being implemented. One principal objective of our Prime Time Access Rule is to lessen the degree of network domination of station operation The present degree of network dominance of television broadcasting . . . emphasizes the need for Commission action to improve the situation, and seek to reestablish licensee individuality and responsibility as operable factors in television broadcasting.

Network Television Broadcasting, 25 FCC 2d 318, 329-30

(1970) (emphasis added). The corollary of this basic objective, by necessity, involved the development of first-run prime time syndicated programming as an alternative program source to the networks. See e.g., Network Television Broadcasting, supra, 23 FCC 2d at 394-95.

However, to make that the primary purpose of PTAR and therefore analyze the rule primarily in terms of its impact on program suppliers, simply does not view PTAR in its proper light.

This confusion is not new to the Commission. Following PTAR's adoption in 1970, it was challenged for precisely the

same reason. The Commission responded as follows in the PTAR III proceeding:

In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objective: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material. These are still valid objectives.

Prime Time Access Rule, 50 FCC 2d at 829 (1975) (emphasis added).

Three fundamental criteria are set forth in the Notice for evaluating the efficacy of PTAR:

1. The manner in which PTAR has functioned to increase opportunities for independent programmers.
2. The manner in which PTAR has functioned to reduce network ability to dictate affiliate program choices.
3. The extent to which PTAR is necessary to provide independent stations with the competitive advantage of greater programming choices.

Each should be reviewed in the context of this proceeding. However, they are not co-equal in the ultimate assessment.

While PTAR sought to provide stations with alternative sources of prime time programming apart from the national

networks, increasing opportunities for independent programmers was not the primary or ultimate objective of the rule. This Commission, after all, is not directly responsible for the health and well-being of the program production industry. Historically, it has been concerned only to the extent that broadcast stations and the public they serve stand to be adversely affected.

Nor was PTAR intended to provide independent stations with the competitive advantage of greater programming choices over affiliated stations. In adopting PTAR, the Commission expressed the hope that the development of a more diverse and competitive program supply industry for stations would also benefit independent stations. Network Television Broadcasting, supra, 23 FCC2d at 395. Viewed overall, this has been one of the benefits of PTAR. However, the Commission did not adopt PTAR to give independent stations an artificial competitive advantage over affiliated stations. Quite to the contrary, to the extent this phenomena has occurred, it is clear reason to repeal the cause of the problem -- the off-network restriction. The basic PTAR principle, in and of itself, is not the problem.

**II. THE BASIC PTAR PRINCIPLE IS AS
NECESSARY NOW AS IT WAS IN 1970**

As to the key issue, the Notice speculates that the relative position of affiliates vis-a-vis the networks may

have changed to a sufficient degree to permit repeal of PTAR (Notice, ¶41). Group W does not believe this speculation is well-founded. According to the Notice, affiliates now have greater options than were available in 1970, ". . . especially the possibility of changing their affiliation . . ." or ". . . obtaining programming even without having a network affiliation, as indicated by the growth in the number of independent, unaffiliated stations." (Notice, ¶41).

Neither conclusion withstands critical scrutiny. It is obviously true that major shifts in affiliation have occurred in many television markets during the past year. See Section III, infra. This phenomena, however, is more reflective of a longer-term realignment (largely due to the growth of Fox) than evidence of a more flexible marketplace for network affiliations. Indeed, as many of the new affiliation arrangements are for significantly longer terms than the traditional two-year arrangement, the opportunity for affiliation shifts in the future probably will be lessened.

Similarly, largely due to the growth of Fox and recent emergence of two additional new networks (United Paramount and Warner), the ability of a station to operate successfully as a pure independent with no network

affiliation whatsoever, is less certain. While the number of independent, unaffiliated stations has indeed grown substantially over the past twenty years, many of these stations have now become or are likely to become network affiliates of some type. For example, the Notice (§16) summarizes that the number of independent stations has grown from 82 in 1970 to over 450 in 1994. If it is considered, however, that this number of independent stations in 1994 includes from 150 to 200 Fox affiliates, the number of current true independents is substantially less.

Furthermore, should United Paramount and Warner experience a similar growth, the number of independents would rapidly decline to zero. Plainly, the Commission cannot rely on the increasing number of available network services, while at the same time assuming that the alternative of independent station operation will remain a viable alternative for the local station.

The Notice also speculates that the increasingly competitive video marketplace overall makes it ". . . increasingly unlikely that the networks would attempt to force their affiliates to take unpopular programs or programs necessarily different from those the affiliates themselves would choose." (Notice, §42). This is not the

real issue. Networks, just like stations, do not try to offer unpopular programs. Operators of affiliated stations, like Group W, value their network affiliation arrangements because of the popular, high quality programming that can be obtained.

Rather, the correct issue to consider is whether the increasingly competitive demands of the video marketplace will create pressures on the networks to offer more and more programming to the exclusion of a licensee's own programming efforts. From this standpoint, Group W believes that PTAR will continue to serve an important role as a modest measure to insure that affiliated stations occupy a meaningful role in the television industry and are able to carry out their basic public interest responsibilities.

**III. THE OFF-NETWORK RESTRICTION IS
UNNECESSARY TO PTAR AND NO LONGER
SERVES THE PUBLIC INTEREST**

In adopting PTAR, the current off-network restriction was included to ensure that the use of off-network product in the access period would not hamper the development of a viable first-run program syndication industry to serve the needs of stations. Group W's original PTAR proposal did not include an off-network restriction. Furthermore, when suggested by other parties during the course of the

proceeding, Group W did not support these proposals and took no position with respect to the need for an off-network restriction. Its view then, as now, was that the off-network restriction was not an integral component of PTAR.

Whether or not necessary as an initial protective measure, it is clear that the off-network restriction has outlived whatever purpose it had. First-run program syndication is a viable and mature industry capable of standing on its own in the competitive marketplace. Moreover, from the standpoint of affiliated stations subject to the rule, the rule unfairly restricts programming choices and treats similarly situated stations in an extremely disparate and unfair manner.

In particular, with the development of Fox into a fully competitive national network able to compete for the national television audience and affiliated stations on a par with the other three national networks, the off-network restriction has become an anomaly. Under current network definitional and PTAR provisions, not only are Fox network affiliates exempt from PTAR until such time as Fox regularly provides more than 15 hours of prime time programming, but Fox affiliates will remain exempt from off-network requirements (insofar as programming then under contract is concerned) for three years after Fox passes the network definitional threshold.^{4/} This extended and perhaps

^{4/} See Section 73.662(f) and Section 73.658(k), n. 4, of the Commission's rules.

permanent exemption from off-network requirements is completely irrational and produces fundamental competitive imbalances in many television markets.

With recent affiliation shifts in many markets, the situation has become even more kafkaesque. Stations subject to off-network restrictions for over twenty years are suddenly not subject to off-network restrictions because of a shift in affiliation to Fox. Conversely, stations which never had cause to be concerned over off-network requirements have just as suddenly become subject to these restrictions. As recently reported, in the top fifty markets subject to PTAR requirements, affiliation shifts involving Fox have now occurred or been announced in 12 markets. This is approximately 25% of the markets subject to PTAR requirements. These shifts largely involve changes from UHF to stronger VHF stations. As a result, the VHF station now affiliated with Fox is no longer subject to off-network requirements, whereas in many markets the UHF station formerly an independent or affiliated with Fox now must operate subject to off-network restrictions. As of December, the reported change in line up was as follows:^{2/}

^{2/} Source: Affiliation Scorecard, Broadcasting and Cable, December 5, 1994, p. 50.

<u>Market (Size)</u>	<u>Station/Channel No Longer Subject to Off-Network</u>	<u>Station/Channel Now Subject to Off-Network</u>
Dallas/Ft. Worth (8)	KDFW (4)	KTUT (11)
Detroit (9)	WJBK (2)	WGPR (62)
Atlanta (10)	WAGA (5)	WGNX (46)
Cleveland (13)	WJW (8)	WOIO (19)
Tampa (15)	WTVT (13)	WFTS (28)
Phoenix (19)	KSAZ (10)	KPHO (5)
St. Louis (20)	KTVI (2)	KDNL (30)
Milwaukee (29)	WITI (6)	WDJT (58)
Kansas City (31)	WDAF (4)	KSHB (41)
New Orleans (41)	WWUE (8)	
Memphis (42)	WHBQ (13)	
Greensboro/ High Point/ Winston-Salem (48)	WGHP (8)	

To remedy this absurd situation, the Notice (¶55) suggests that a change in the definition of what constitutes a network might be appropriate. While this might solve some of the immediate problems, Group W does not believe that such a change would be sufficient to deal fairly with the situation on a permanent basis. Whatever definition that might be fashioned to encompass Fox would probably cause inequities as the United Paramount and Warner networks develop. Rather, the Commission should directly address the underlying problem and eliminate the inequities through repeal of the off-network restriction.

CONCLUSION

Group W's support of PTAR has never been motivated by any ill will towards the networks or view that the role of networking should be drastically altered. Quite to the contrary, as the operator of network affiliated stations for

almost 50 years and a partner of one network in several major business ventures, Group W values the key role of the network in providing a high quality nationally produced programming for the local station to use in serving its audience. Such service is essential to the overall service provided by the local station. By the same token, however, the networks must recognize the needs and responsibilities of the local affiliate and the role of PTAR in ensuring the fulfillment of these basic responsibilities. ^{6/}

The comprehensive program adopted by the Commission in 1970 included not only PTAR, but the related Syndication and Financial Interest Rules limiting network participation in the production and syndication of television programming to stations. With the upcoming "sunset" of all these latter rules, now is not the time to repeal PTAR. Quite to the contrary, with unrestricted network participation in program production and distribution, PTAR will become an even more important measure to ensure a reasonable degree of affiliate program independence and responsibility. At the very minimum, the Commission should at least have the benefit of examining industry conditions for a reasonable period after

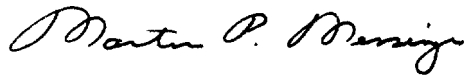
^{6/} The Notice, ¶58, requests comment on the constitutionality of PTAR. This issue has been previously addressed by Group W in extensive comments filed August 17, 1990, opposing the Petition for Declaratory Ruling filed by First Media Corporation, MMB File No. 9000418A. These comments are incorporated herein. All courts that have reviewed PTAR, as well as the now expiring syndication and financial interest restrictions, have found no constitutional problem. See Schurz Communications v. FCC, 982 F.2d 1043, 1048-49 (7th Cir. 1992).

all Fyn/Syn restrictions are lifted, before considering
repeal of basic PTAR requirements.

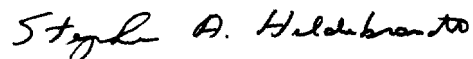
For these reasons, the Commission should promptly
repeal the off-network restriction while retaining the
fundamental Prime Time Access Rule.

Respectfully submitted,

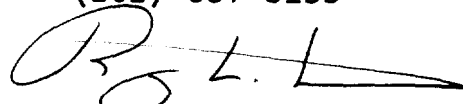
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